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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re ROBERT MATTHEW FRUSHON,

On Habeas Corpus.

E065605

(Super.Ct.No. RIF1105574)

OPINION

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Becky Dugan, Judge. Transferred to the Superior Court of Riverside County.

Steven L. Harmon, Public Defender, Laura Arnold, Deputy Public Defender, for Petitioner.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor, Warren J. Williams, and Teresa Torreblanca, Deputy Attorneys General, for Respondent.

On May 21, 2012, petitioner pled guilty to unlawful possession of a dirk or dagger (Pen. Code, former § 12020, subd. (a)(4))¹ and participation in a criminal street gang (§ 186.22, subd. (a)). The trial court sentenced petitioner to two years on each of the counts, to run concurrently, and petitioner is still on parole with respect to these charges.

On September 30, 2015, petitioner filed a petition for habeas corpus in this court. He argued that his conviction for participation in a criminal street gang must be vacated because he was acting alone at the time of the arrest, and that, after the decision in *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*), the People must prove that at least two gang members engaged in felonious activity in order to obtain a conviction under section 186.22, subdivision (a).

We summarily denied the petition on September 23, 2015. On March 22, 2016, the California Supreme Court ordered respondent to show cause, in this court, why petitioner should not obtain the relief he requests in light of *Rodriguez* and *People v. Johnson* (2014) 229 Cal.App.4th 910. In so doing, the court “signifie[d its] ‘preliminary determination that the petitioner has made a prima facie statement of specific facts which, if established, entitle [petitioner] to habeas corpus relief under existing law.’ ” (*In re Serrano* (1995) 10 Cal.4th 447, 454-555.)

Nonetheless, “it is the petitioner who bears the ultimate burden of proving the factual allegations that serve as the basis for his or her request for habeas corpus relief.” (*In re Serrano, supra*, 10 Cal.4th at p. 456.) In this case, additional evidence must be

¹ All further statutory references are to the Penal Code unless otherwise indicated.

taken to determine whether petitioner was acting alone, as he must have been if he is to fall under *Rodriguez*. Contrary to the assumption petitioner makes throughout his briefing, the police report is not evidence that he was not “willfully advanc[ing], encourag[ing], contribut[ing] to, or help[ing]” at least one other gang member to commit a felony when he was arrested. (*Rodriguez, supra*, 55 Cal.4th at p. 1132.) A declaration or even an affirmative statement in the verified portion of the petition may have sufficed to prove that petitioner really was acting alone as he claims, but we found no such item in the record. An evidentiary hearing is therefore necessary and will be conducted in the trial court.

DISPOSITION

The parties are ordered to appear and show cause before the Superior Court of Riverside County, at a place, date, and time set by the superior court, no later than 60 days after the date of this opinion, why the relief sought in the petition should not be granted. Within 20 days of this opinion, the parties are to file copies of all briefs and all evidence submitted to the California Supreme Court in association with this petition.

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MILLER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.